DARRELL WADENA, TONY WADENA, JERRY RAWLEY,
PAUL WILLLAMS, RICK CLARK, and DOYLE TURNER
v.
ACTING MINNEAPOLIS AREA DIRECIOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-99-A Decided December 11, 1996

Appeal from a decision recognizing an interim tribal council for the White Earth Reservation Business Committee, a.k.a. White Earth Reservation Tribal Council.

Reversed.

1. Administrative Procedure: Stays--Indians: Generally

Under 43 CFR 4.314, a decision issued by a Bureau of Indian Affairs Area Director is stayed during the pendency of an appeal to the Board of Indian Appeals. When the Board declines to place such a decision into immediate effect, that decision is not in effect for any purpose.

2. Indians: Tribal Government: Constitutions, Bylaws, and Ordinances--Indians: Tribal Powers: Self-Determination--Indians: Tribal Powers: Tribal Sovereignty

A Bureau of Indian Affairs decision recognizing tribal leadership that, inter alia, does not follow tribally established procedures for obtaining a tribal interpretation of the tribal constitution, but instead imposes the Bureau's own interpretation of the constitution, constitutes an unwarranted intrusion into tribal sovereignty and self-government.

APPEARANCES: Peter W. Cannon, Esq., Mahnomen, Minnesota, for appellants; Miles W. Lord, Esq., and Zenas Baer, Esq., Hawley, Minnesota, for Eugene "Bugger" McArthur and John Buckanaga; Marcia M. Kimball, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Ft. Snelling, Minnesota, for the Minneapolis Area Director; Robert Durant, pro se, as amicus curiae.

OPINION BY CHIEF ADMINSTRATIVE JUDGE LYNN

Appellants Darrell Wadena, Tony Wadena, Jerry Rawley, Paul Williams, Rick Clark, and Doyle Turner seek review of a June 26, 1996, decision of the Acting Minneapolis Area Director, Bureau of Indian Affairs (Area Director; BIA), recognizing an interim tribal council for the White Earth Reservation Business Committee, a.k.a. White Earth Reservation Tribal Council (Tribal Council). For the reasons discussed below, the Board of Indian Appeals (Board) reverses the June 26 decision.

The White Earth Band (Band) is one of six constituent bands of the Minnesota Chippewa Tribe (Tribe). Prior to June 1996, the Band's Tribal Council consisted of Chairman Darrell Wadena, Secretary-Treasurer Jerry Rawley, District I Representative Rick Clark, District II Representative Tony Wadena, and District III Representative Paul Williams.

On June 11, 1996, the Band held a regular election. The materials before the Board show that Tony Wadena's District II seat was not on the ballot, but that the positions of Chairman and District III Representative were. Although nothing before the Board specifically states whether the positions of Secretary-Treasurer and District I Representative were up for reelection, for purposes of this decision, the Board assumes they were not. In accordance with Article XVII, Section B, of the Minnesota Chippewa Tribe Election Ordinance No. 5, as amended through January 1, 1996 (Election Ordinance), the terms of those incumbents whose seats were up for reelection were due to expire on July 9, 1996.

Eugene "Bugger" McArthur received the most votes for Chairman, and John Buckanaga received the most votes for District III Representative. Election protests were filed in regard to both of these seats. 1/

On June 18, 1996, Acting council Chairman Clark, Tony Wadena, and Rawley selected Yvonne Novack to serve as Reservation Election Appeals Judge. The record of the meeting states "that Darrell Wadena and Paul Williams were contacted about the meeting. Both decided not to be present because they were candidates in the June 11, 1996, election and that Darrell Wadena had filed a protest."

On June 24, 1996, Darrell Wadena, Clark, and Rawley were convicted of various felonies in the United States District Court for the District of Minnesota. United States v. Wadena, Criminal 3-95-102 (D. Minn.).

At or about 8:00 am, June 25, 1996, McArthur called a special emergency Tribal Council meeting for 9:00 am the same day. Minutes from that meeting state that "Chairman" McArthur called the meeting to order, and

1/ Appellant Doyle Turner, who was a candidate for Chairman, was among those filing election protests.

that "Council Member" Buckanaga attended. The minutes state that Tony Wadena was notified of the meeting, but did not attend. They give no indication as to whether Darrell Wadena, Clark, Rawley, and Williams were notified. The minutes continue:

> According to the Minnesota Chippewa Tribal Constitution, any tribal council member convicted of a felony shall be removed as a member of the committee. The convictions in Federal District Court of Darrell "Chip" Wadena, Rick Clark, and Jerry Rawley of various felonies mandates their removal pursuant to Article X, Section 2.
>
> A quorum of those eligible to vote at the meeting being present, a motion was duly made by Council Member Buckanaga and seconded by Chairman McArthur to declare the position of Secretary-Treasurer [the position held by Rawley] open. [Emphasis in original.]

McArthur and Buckanaga then selected Erma Vizenor as Secretary-Treasurer and administered the oath of office to her. The position of District I Representative, held by Clark, was similarly declared open, and Buckanaga and Vizenor voted to select Irene Auginaush-Hvezda for that position. It appears that Auginaush-Hvezda was not present on June 25, 1996, when the other three individuals enacted several resolutions, including, as relevant to this appeal, Resolution 96-4A, which removed Novack from the position of Reservation Election Appeals Judge, and replaced her with Paul Day.

On June 25, 1996, Darrell Wadena wrote to BIA requesting assistance in regard "to an attempt by several marbers of the White Earth Band to insert themselves in positions on the Reservation Tribal Council and to purport to exercise the authority of those offices." He asked BIA to reaffirm its recognition of his government.

McArthur, Buckanaga, Vizenor, and Auginaush-Hvezda held another meeting on June 26, 1996, and passed several additional resolutions. Resolution 96-6A provides:

> A special meeting of the WHITE EARTH TRIBAL COUNCIL, was held at tribal headquarters on the 26th day of June 1996. Members present were CHAIRMAN MCARTHUR, SECRETARY - TREASURER VIZENOR, COUNCILMEMBERS BUCKANAGA, HVEZDA, absent was COUNCILMEMBER WADENA. The discussion was the title to be given to the government presently installed in White Earth. A motion was made, seconded and unanimously approved to adopt a resolution as follows:
>
> RESOLVED, that the undersigned govenment was installed by taking the oath of office pursuant to the Constitution and By-Laws of the Minnesota Chippewa Tribe on an emergency basis, and

will be referred to as the INTERIM WHITE EARTH TRIBAL COUNCIL, until each of the following conditions have been satisfied:

1. The conditions of release of the convicted former tribal officials have been set, and,

2. The election protests have been resolved by the terms of the Minnesota Chippewa Tribal Constitution and By-Laws and the terms of the [Election Ordinance].

FURTHER RESOLVED, that the INTERIM WHITE EARTH TRIBAL COUNCIL will work with the BIA to ensure the forgoing conditions have been met.

It appears that a copy of Resolution 96-6A was forwarded to BIA. 2/

The Area Director acted on June 26, 1996, stating:

The primary issue is the recognition of a White Earth Tribal Council by [BIA]. In light of the recent federal felony convictions of Darrell Wadena, Rick Clark, and Jerry Rawley * * *, [BIA] can no longer recognize the seated Council * * *. The Constitution of the Minnesota Chippewa Tribe provides no method by which to remove three members of the Tribal Council, therefore in order to protect and secure tribal resources, [BIA] believes extraordinary measures are necessary.

Given the lack of constitutional direction in this matter, we believe it necessary to recognize the interim Tribal Council established under Resolution 96-6A, subject to the following conditions:

1. the election protests have been completely resolved by the terms of the Minnesota Chippewa Constitution and By-laws and by the terms of the * * * Election Ordinance * * *; and

2. those individuals recognized as the interim Tribal Council are the following individuals: Eugene "Bugger" McArthur, John Buckanaga, and Tony Wadena.

Previous actions taken by the purported Tribal Council beginning on June 25, 1996, and up to this date, can not be ratified by [BIA]. In addition, notwithstanding any established procedures to the contrary, a quorum under these unusual conditions will be two (2) of these members. This mans that if one of these three members is absent from a duly called meeting of the interim Tribal

2/ No copy of this resolution was included in the administrative record submitted to the Board. The Baird requested and received a copy of it from counsel for the Area Director.

> Council, that the remaining two individuals may conduct tribal governmental business. During this interim period prior notice of Tribal Council meetings to the Tribal Council members will be at least 8 hours.
>
> This interim White Earth Council will constitute the Tribal Council until such time as the election protests are brought to a timely conclusion when an orderly transition may take place. This decision will also allow the orderly conduct of tribal government and tribal business.

It appears that McArthur and Buckanaga held another meeting on June 27, 1996. As relevant to this appeal, they passed Resolution 96-10A, which apparently again replaced Novack with Day.

On June 28, 1996, Novack held a hearing on the election protests. 3/ On July 1, 1996, she ruled that a new election must be held because of irregularities in the processing of absentee ballots. There is no indication in anything before the Board that this decision was appealed in accordance with Article XIV, Section C, of the Election Ordinance, which establishes procedures for appealing from the decision of a Reservation Election Appeals Judge.

By letter dated July 3, 1996, the President of the Tribe sent the Area Director a copy of Tribal Constitution Interpretation 1-96. The cover letter states:

> We view the actions taken by [BIA] on June 26 as an unauthorized disruption of the constitutional and electoral processes of the Minnesota Chippewa Tribe, and that such an attempt to interfere with internal tribal affairs marks a return to the long-discredited policies of federal paternalism and oppression of tribal governments. We accordingly declare our opposition to the purported action taken by [BIA] on June 26 and our support for the following of the constitutional principles of the Minnesota Chippewa Tribe.

Tribal Constitution Interpretation 1-96, which was adopted unanimously by the Tribal Executive Committee, states:

> WHEREAS, In a letter dated June 26, 1996, the Acting Area Director, Minneapolis Area office, Bureau of Indian Affairs, has stated that because of the "lack of constitutional direction" he possessed the legal authority to take "extraordinary measures," and that he has the power to remove duly elected members of a Tribal Council of a Band of the Minnesota Chippewa Tribe and establish rules for the operation of that Tribal Council; and

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3/ From a June 27, 1996, notice of change of hearing location, it appears that Day may also have participated as a judge in this hearing.

WHEREAS, The Tribal Executive Committee of the Minnesota Chippewa Tribe established the principle, in its Constitutional Interpretation No. 4-81, on January 27 and 28, 1981, that the Tribal Executive Committee--

> Is the only proper body to interpret the Constitution of the Minnesota Chippewa Tribe and that the United States, through its courts, solicitors, or employees, lacks the authority or jurisdiction to determine the meaning of the Constitution of the Minnesota Chippewa Tribe in opposition to the interpretations or actions of the Tribal Executive Committee.

NOW THEREFORE BE IT RESOLVED, The Tribal Executive Committee of the Minnesota Chippewa Tribe does herewith reaffirm its long-held position that the officials of the government of the United States, including but not limited to the Acting Area Director of the Minneapolis Area Office, Bureau of Indian Affairs, do not possess any legal authority to interpret the Constitution of the Minnesota Chippewa Tribe, or to remove sitting members of a government of a Band of the Tribe, or to establish rules for the operation of a government of a Band of the Minnesota Chippewa Tribe.

Also on July 3, 1996, the United States District court for the District of Minnesota issued an order of dismissal in Wadena v. Bureau of Indian Affairs, File No. 6-96-195, in which Darrell Wadena had asked the court to issue a writ of quo warranto, a temporary restraining order precluding BIA from recognizing McArthur as chairman of an interim tribal council, and a declaratory judgment that McArthur held no legitimate claim to that office. The petition was dismissed for failure to exhaust administrative remedies.

On July 5, 1996, the Board received appellants' notice of appeal.

Day issued a decision on August 2, 1996, as Reservation Election Appeals Judge. He stated that there were five protesters before him. According to the decision, two people withdrew their protests. The remaining three protesters, including appellant Turner, refused to recognize Day's authority. Day dismissed the first two protests as having been withdrawn, and dismissed the three remaining protests for failure to participate. There is no evidence before the Board that this decision was appealed under the Election Ordinance.

Also on August 2, 1996, the Federal district court ordered that Darrell Wadena be taken into custody for violation of the conditions of his pre-sentencing release. The Board is unaware of the date set for sentencing, but assumes for purposes of this decision that Darrell Wadena is still in custody.

On September 12, 1996, the Board received a message from a Roberta Brown. The message states: "As an informational item, I enclose a copy

of the certified results of the September 10, 1996, Special Election held by the White Earth Reservation." Attached was a tabulation of votes for the positions of Chairman and District III Representative. The tabulation was dated September 10, 1996, and was signed by Carley M. Jasteen, Jane M. Tibbett, and Janice Murray as the White Earth Reservation General Election Board. It reports that Doyle Turner received a total of 296 votes for the position of Chairman, Boone Wadena received 30 votes, and Lowell Bellanger received 78 votes; and that Paul Williams received 52 votes for the position of District III Representative and Robert Durant received 59 votes. The only information before the Board indicating why this special election was held is an article from the September 6, 1996, Minnesota edition of The Forum, in which appellant Turner is credited with stating that the election was being held because of Novack's ruling.

On October 8, 1996, a special meeting of the Minnesota Chippewa Tribal Executive Committee was held. The copy of the minutes of that meeting submitted to the Board is undated and unsigned. As relevant to this appeal, the minutes state:

> Discussion was also held regarding the swearing in of Eugene McArthur, Chairman of the White Earth Reservation to the Tribal Executive Committee.
>
> The Tribal Executive Committee decided to swear in Eugene McArthur as the Chairman for White Earth. This decision was not unanimous. There has been a proposed election date set for January 14, 1997, for the positions of Secretary/Treasurer and District I Representative because the current positions have been appointed and not elected. [4/]

Motion to Place the June 26 Decision into Immediate Effect

In his July 31, 1996, memorandun transmitting the administrative record to the Board, the Area Director requested that the June 26 decision be placed into immediate effect during the pendency of this appeal. 25 CFR 2.6(a) provides that

> [n]o [BIA] decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal

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4/ By undated Ordinance No. 97-01, McArthur and Buckanaga adopted a primary election ordinance. The ordinance provides for a primary election to be held 60 days prior to a regular election and 30 days prior to a special election. A primary election would be required if more than two people filed for any one position. On Oct. 10, 1996, by a vote recorded as 3 for, 1 against, 0 silent, and 0 absent, Resolution No. 001-97-004 was adopted by McArthur's council. The resolution sets Mar. 11, 1997, as the date for a special election for Secretary-Treasurer and District I Representative, with a primary election to be held on Jan. 14, 1997.

> is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

43 CFR 4.314(a) similarly provides that no BIA decision appealed to the Board is final "unless made effective pending decision on appeal by order of the Board."

The Board established an expedited briefing schedule on this motion. Extensive briefs were filed by appellants, McArthur, 5/ the Area Director, and Robert Durant. 6/ On September 10, 1996, the Board declined to place the June 26 decision into immediate effect, but granted expedited consideration of the merits of the appeal.

On October 7, 1996, the Board received a telephone inquiry from the Office of the Assistant General Counsel, Department of Housing and Urban Development (HUD), concerning the Band's recognized government in light of the Board's September 10, 1996, order. HUD was attempting to verify the accuracy of an October 1, 1996, letter from the Field Solicitor's Office to the Area Director. HUD provided the Board a ccpy of the October 1, 1996, letter. The letter stated that the Board's order had the effect of keeping the matter in an administrative forum,

> [h]owever, the question which remains is whether the decision to recognize the interim council should continue to operate during this appeal. The answer to that question is not found within the [Board's] brief order of September 10, 1996, but rather in the general rules relating to procedures and practice of hearing before the various Departmental Appeals Boards of the Office of Hearings and Appeals. The rules of 43 C.F.R. § 4.21 provide the uniform rules for giving a decision effect pending appeal.
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> The letter then discussed the effect of 43 CFR 4.21 7/ at great length. It ended:
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> The issue of a stay of [the Area Director's] June 26, 1996 decision was never requested or argued to the [Board]. Therefore,

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5/ McArthur's brief begins: "As members of the Interim Government of the White Earth Band of Chippewa, we * * *." Tony Wadena, who was recognized as a member of the interim tribal council by the June 26 decision, is an appellant in this matter. The Board therefore concludes that he is not a party to McArthur's brief. Buckanaga was recognized as the third member of the interim tribal council. For purposes of this decision, the Board assumes that "we" in McArthur's filings refers to McArthur and Buckanaga.

6/ Durant requested and was granted permission to file a brief as amicus curiae pursuant to 43 CFR 4.313.

7/ Section 4.21(a) provides:

"Effect of decision pending appeal. Except as otherwise provided by law or other pertinent regulation:

> until a decision is issued by the [Board] which affirms, overrules, modifies or remands [the Area Director's] decision, the decision to recognize an interim tribal council at White Earth is effective.

[1] The Board addressed this letter in an order dated October 8, 1996. It repeats its holding here:

> The September 10 order was brief because the Board did not believe it was necessary to say more. However, it appears the Board was mistaken.
>
> The advice from the Field Solicitor to the Area Director is incorrect. The general rules of the Office of Hearings and Appeals, found in 43 CFR Part 4, Subpart [B], apply only when they are not superseded by a specific rule applicable to a particular appellate board. The Board's regulations in 43 CFR 4.314 provide that BIA decisions are automatically stayed pending appeal. This automatic stay continues the stay inposed by 25 CFR 2.6 in BIA's appeal regulations. 43 CFR 4.21 was consistent with 43 CFR 4.314 before it was revised in January 1993. Because the rules were consistent, the Board cited both 43 CFR 4.21 and 4.314, because 4.21 was better worded than 4.314. However, with the revision of 43 CFR 4.21, which made the general regulation inconsistent with the specific regulation for appeals from BIA decisions, the Board began citing 43 CFR 4.314. Compare Friends of the Wild Swan v. Portland Area Director, 27 IBIA 8, 10 (1994) ("Because of the appeal, the Area Director took no further action * * *, in accordance with 43 CFR 4.314(a), which stays the effect of an Area Director's decision when an appeal is filed with the Board"); with Frazier v. Acting Portland Area Director, 21 IBIA 11, 12 (1991) ("pursuant to its authority under 43 CFR 4.21(a) and 4.314(a)").

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fn. 7 (continued)

"(1) A decision will not be effective during the time in which a person adversely affected may file a notice of appeal; when the public interest requires, however, the Director or an Appeals Board may provide that a decision, or any part of a decision, shall be in full force and effect immediately;

"(2) A decision will become effective on the day after the expiration of the tine during which a person adversely affected may file a notice of appeal unless a petition for a stay pending appeal is filed together with a timely notice of appeal; a petition for a stay may be filed only by a party who may properly maintain an appeal;

"(3) A decision, or that part of a decision, for which a stay is not granted will become effective immediately after the Director or an Appeals Board denies or partially denies the petition for a stay, or fails to act on the petition for a stay, or fails to act on the petition within the time specified in paragraph (b)(4) of this section."

The remainder of the section provides standards and procedures for considering a stay petition.

> An Area Director's decision appealed to the Board is stayed during the pendency of the appeal, unless placed into immediate effect by the Board. When the Board declines to place an Area Director's decision into immediate effect, that decision is not in effect for any purpose. The Field Solicitor's advice that the interim tribal council is the government recognized by the Department is incorrect. The interim tribal council will only be recognized if the Board affirms the Area Director's decision on the merits after the conclusion of briefing.

Oct. 8, 1996, Order at 1-2.

Standard of Review

Appellants first discuss the standard of review, noting that the Area Director cited no statute, regulation, court decision, Board decision, or other material as the basis for his decision. In their memorandum in opposition to placing the June 26 decision into immediate effect, appellants contend that this appeal "should be measured under a similar standard to the 'good cause' requirement of 5 U.S.C § 553(d)(3) [(1994) 8/]. The usual standard of 'arbitrary' or 'capricious' decision-making pursuant to adopted regulations is inappropriate." Memorandum at 3. Appellants repeat this argument at pages 1 and 19 of their opening brief.

5 U.S.C. § 553 deals with agency rulemaking. Subsection (d) states: "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except-- * * * (3) as otherwise provided by the agency for good cause found and published with the rule."

Except for this citation to 5 U.S.C. § 553(d)(3), appellants make no argument that rulemaking is involved in this case. The Board concludes that section 553(d)(3) is not relevant to the standard of review in this case because rulemaking is not involved here and because the section does not establish a standard of review in any event.

In an argument seemingly inconsistent with the one just discussed, appellants also suggest in their opening brief that the standard of review before the Board is the same as that before a Federal court; i.e., the "arbitrary, capricious, or abuse of discretion" standard set forth in 5 U.S.C. § 706(2)(A). McArthur also contends that this is the appropriate standard of review. McArthur's Brief at 4. The Board has previously rejected this argument, and has held that, in the absence of a regulatory restriction on its review authority, it "has authority to review [a] case 'as fully * * * as might the Secretary.'" 43 CFR 4.1; Ute Indian Tribe of the Uintah and Ouray Reservation v. Phoenix Area Director, 21 IBIA 24, 27 (1991). In addition, 43 CFR 4.318 authorizes the Board to "exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate." This standard and scope of review will be applied here.

8/ All further citations to the United States Code are to the 1994 edition.

Discussion and Conclusions

Appellants' primary argument is that the June 26 decision was an unauthorized suspension of the tribal constitution and other governing documents, in that the decision negated provisions of tribal law dealing with how seated officials may be removed from office, when newly elected officials take their seats, under what circumstances the Chairman may vote, and what constitutes a quorum.

Article X of the constitution deals with vacancies on and removals from the Tribal Council. Section 2 provides:

> The Reservation Business Committee by a two-thirds (2/3) vote of its members shall remove any officer or member of the Committee for the following causes:
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> (a) Malfeasance in the handling of tribal affairs.
>
> (b) Dereliction or neglect of duty.
>
> (c) Unexcused failure to attend two regular meetings in succession.
>
> (d) Conviction of a felony in any county, State or Federal court while serving on the Reservation Business Committee.
>
> (e) Refusal to comply with any provisions of the Constitution and Bylaws of the Tribe.
>
> The removal shall be in accordance with the procedures set forth in Section 3 of this Article.

In addition to the procedures in Section 3, further procedures for removal of an elected official are established in Sections 4 and 5 of Article X of the constitution.

Darrell Wadena, Rawley, and Clark were convicted of felonies in Federal district court during their tenure in office, and were, therefore, subject to removal under Article X, Section 2(d), of the constitution. Williams, however, was neither convicted nor indicted, and there has been no allegation that he was subject to removal for any of the other causes listed in Article X, Section 2. 9/ Prior to the issuance of the June 26 decision, the

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9/ The most incriminating statement against Williams in the materials before the Board is found at page 3 of an Aug. 23, 1996, letter to Senator Paul David Wellstone. The Area Director there stated that Williams and Tony Wadena "did not ever protest, or object to the illegal activities of" Darrell Wadena, Rawley, and Clark. There is nothing in the materials before the Board that suggests Williams was aware that these individuals were doing anything illegal.

constitutional procedures for removing an elected official from office had not been followed in regard to any of these four officials.

In his answer brief, the Area Director contends that the choice on June 26, 1996, was

> recognition of a government which had been unsuccessful at the polls and was composed of a majority of recently convicted federal felons or newly-elected leadership.
>
> The June 26, 1996 decision recognized the apparent winner of the election for the chairman position and for the District III position and the District II representative whose position had not been at stake during the election. The decision recognized an interim tribal government subject to several conditions. [Emphasis in original.]

Answer Brief at 3. The Area Director's brief continues:

> The BIA will, in those situations in which the tribe has interpreted tribal governing documents, defer to those interpretations. However, neither the [Band] nor the [Tribe] * * *, had ever been called upon to interpret the provisions of the [constitution] which dealt with removal. More particularly, neither entity had ever been asked to deal with removal in light of a situation in which a quorum of tribal representatives had been convicted of federal felonies. In the absence of a tribal interpretation of the removal provision of the constitution, the BIA has the authority to interpret tribal law in order to determine a tribe's legitimate governing body. Totenhagen v. Minneapolis Area Director, 15 IBIA 105 (1987). [10/] The BIA has "[b]oth the authority and the responsibility to interpret tribal law when necessary to carry out the government-to-government relationship with the tribe." Reese v. Minneapolis Area Director, 17 IBIA 169, 173 (1989). [11/] [Emphasis in original.]

Id. at 5.

10/ The complete citation to this case is: Totenhagen v. Minneapolis Area Director, 15 IBIA 105, recon. denied, 15 IBIA 121, 15 IBIA 123 (1987); rev'd and remanded, Prescott v. Hodel, Civil No. 4-87-106 (D. Minn. July 10, 1987); on remand, 16 IBIA 9 (1987).

11/ The Board finds the choice of Reese as the citation for this frequently stated principle interesting in the context of this case. Reese involved an election dispute within the Leech Lake Band, another of the Tribe's constituent member bands. The election dispute was submitted to a Reservation Election Appeals Judge who, in issuing her decision, interpreted the constitution. Both the Election Board and the Tribe sought reconsideration before the Election Judge, citing Tribal Constitution Interpretation 1-80 in arguing that she had exceeded her authority in interpreting the constitution. When the Election Judge refused to withdraw her decision, the Tribe created

The June 26 decision appears to have interpreted Article X, Section 2(d), of the constitution as mandating removal upon conviction of a felony while in office. In his brief before the Board, the Area Director argues:

> With three of the five members of the [Tribal Council] convicted in a joint trial * * *, a vote of two-thirds, as required by the tribal constitution, seemed impossible. The Acting Area Director concluded that the constitution did not contain a provision which could address the removal of three convicted felons.
>
> Therefore, without prior interpretation of the tribal governing documents, and under unusual circumstances, the action by the Acting Area Director was necessary in the interim period between the election and convictions and the completion of the election appeals.

Id. at 6.

The June 26 decision and the arguments in the Area Director'sanswer brief overlook two very salient points. First, the Tribe advised BIA in 1980 that, if an interpretation of its constitution was necessary, it would provide an interpretation upon request. Tribal Constitution Interpretation No. 1-80 states:

> The Minnesota Chippewa Tribal Executive Committee does declare that it shall henceforth issue written opinions as to the meaning and interpretation of its constitution. Said opinions shall be issued in writing upon written request of the Reservation Business Committees, the Tribal Executive Director, Division Heads

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fn. 11 (continued)
an appellate tribunal for the sole purpose of reviewing the decision. In what the Board described as a carefully worded and limited decision, the appellate tribunal held that the Election Judge had exceeded her authority. Reese appealed to BIA, which, through both the Superintendent and the Area Director, declined to become involved in the dispute. On appeal, the Area Director "characterize[d] the matter as an attempt to involve BIA in the tribal election process. Based upon this characterization, [the Area Director] argue[d] that tribal law provides no role for BIA in election disputes, and, therefore, argue[d] that neither BIA nor the Board [could] review the results of an election." 17 IBIA at 173. The Board held:

"Once it has been found that the [Tribal Executive Committee] had authority to delegate to a tribal court the type of review given in this case, and that, therefore, the creation and use of such a tribal forum did not violate the rights of the tribal members, the Board and BIA have no further role to play in the determination of the results of this tribal election. The matter has been considered and decided by a duly authorized tribal forum. The Department must defer to that body." [Footnotes omitted.] 17 IBIA at 175.

> of the Tribe's Subdivisions, Tribal Judges, the United States and its various departments and bureaus, the State of Minnesota and its politicial subdivisions and other entities at the direction of the Tribal Executive Committee or upon its own motion. Said opinions shall be conclusive and final as to the meaning and interpretation of The Minnesota Chippewa Tribe's Constitution and the powers contained therein. (Said opinions shall be binding upon any tribal court system established by tribal ordinance.)

[2] The Area Director did not avail himself of the opportunity to request an interpretation of the constitution from the Tribal Executive Committee. In fact, he does not mention Tribal Constitution Interpretation No. 1-80. As the Board reiterated in Bucktooth v. Acting Eastern Area Director, 29 IBIA 144, 149 (1996), "[i]t is a well-established principle of Federal law that intra-tribal disputes should be resolved in tribal forums. This rule applies with particular force to intra-tribal disputes concerning the proper composition of a tribe's governing body." See also cases cited in Bucktooth; John v. Acting Eastern Area Director, 29 IBIA 275 (1996). When a determination of the proper composition of a tribe's governing body requires an interpretation of the tribal constitution, and the tribe has established a procedure by which it will provide such an interpretation, BIA should allow the tribe the opportunity initially to interpret its own governing documents rather than immediately acting to impose its own interpretation. BIA's failure to request an interpretation of the constitution from the Tribal Executive Committee constituted an unwarranted intrusion into tribal sovereignty and self-government.

Second, Article X, Section 5, of the constitution provides:

> In the event the Reservation Business Committee fails to act as provided in Sections 3 and 4 of this Article [concerning removal], the Reservation membership may, by petition supported by the signatures of no less than 20 percent of the eligible voters, appeal to the Secretary of the Interior. If the Secretary deems the charges substantial, he shall call an election for the purpose of placing the matter before the Reservation electorate for their final decision.

The June 26 decision appears to have overlooked this constitutional provision. 12/ The Board holds that the June 26 decision erred in failing

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12/ BIA was aware of the provision earlier. In Vizenor v. Babbitt, Civil No. 6-95-230 (D. Minn. Apr. 9, 1996), 23 Indian L. Rep. 3203, certain members of the Band and of the Leech Lake Band, which also had tribal officials under indictment, sought the appointment of an independent Federal trustee to recapture monies allegedly stolen by tribal leaders, supervise tribal business activities, and supervise the June 1996 elections. The Department sought and was granted dismissal of the suit on the grounds, inter alia, that the plaintiffs had not exhausted their tribal remedies. After quoting

to acknowledge the existence of this constitutional provision which could address the removal of a tribal official or officials for any of the reasons listed in Article X, Section 2, of the constitution if the Tribal Council failed to act.

The Area Director does not even address the removal of Williams. 13/ Williams was not a convicted felon. Although he had apparently lost his bid for reelection, an election protest had been filed. Article XVII, Section B, of the Election Ordinance provides:

> In the absence of formal action by a Tribal Council pursuant to part "A" of this section, the winning candidates in Regular Elections shall take office and assume all the authority of their positions at 12:01 a.m. on the second Tuesday in July following the elections; provided that if an election for a particular position is protested and the protest has not been finally ruled upon in accordance with this Ordinance the incumbent shall remain in office pending such final decision and until a new person takes office.

No one has disputed either that, in the absence of an election protest, Williams' term of office would have expired on July 9, 1996, or that an election protest was filed regarding the District III Representative seat. On July 1, 1996, Novack issued her decision in the election protests. If her decision were determined to be in effect, Williams and Buckanaga would be participating in a special election for the District III Representative seat. Day issued his decision on August 2, 1996. If his decision were held to be the proper one, Buckanaga should not have taken his seat until August 2, 1996.

The Board sees no basis upon which BIA could have found Williams not to be a member of the Tribal Council on June 26, 1996. His term of office had not expired, and no allegations warranting removal from office had been made against him. The June 26 decision therefore violated the Election Ordinance to the extent it deemed Williams "removed" from office as of June 26, 1996.

The Area Director asserts, however, that "circumstances exist in which the BIA is required to recognize an interim tribal government until such time as stated conditions are met." Answer Brief at 6. Citing

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fn. 12 (continued)
Article X, Section 5, of the constitution, the court's decision contains the following footnote:

"Defendants [the Secretary of the Interior and named BIA officials] claim that if the remedies provided by the tribal constitution [for removing tribal officials] 'are thwarted by the incumbents, the Secretary will follow the provisions of Article X Section 5 of the [tribal] Constitution.' Defs.' Mem. 7." Slip op. at 22, n.10.

13/ The Board considers only Williams in this part of the discussion even though Darrell Wadena was similarly situated except for his felony conviction.

Goodface v. Grassrope, 708 F.2d. 335 (8th Cir. 1983), he argues that the Federal court has required BIA to recognize conditionally either an old or a new government until a dispute can be resolved. The brief cites several Board cases in support of this argument.

The Board agrees that there are circumstances under which BIA must recognize an interim govement, and has affirmed BIA decisions recognizing interim leadership. See, e.g., Bucktooth; LaRocque v. Aberdeen Area Director, 29 IBIA 201 (1996). However, in those cases in which the Board has approved the recognition of interim leadership, BIA has allowed the tribe involved an opportunity to resolve the dispute. In each case, the individuals BIA recognized as interim leaders had a reasonable claim to those positions under tribal law; in several cases those individuals had prevailed in suits in the tribe's election or trial court, although appeals may have been pending. BIA stepped in and issued a decision only when the situation deteriorated to the point that recognition of some government was essential for Federal purposes, such as maintaining the government-to-government relationship with the tribe or operating P.L. 93-638 grants or contracts.

In this case, BIA failed to allow the Band or the Tribe any opportunity to resolve the dispute, but instead issued its decision with remarkable alacrity. At pages 15-16 of their memorandum in opposition to placing the June 26 decision into immediate effect, appellants assert that "[t]he actions of the Area Director were at best premature and at worst the result of panic coupled with a failure to trust the members of the Reservation to act." The Area Director argues:

> Failure to act * * * would have resulted in prolonged turmoil on a reservation which had just endured a lengthy trial in which three of five tribal council nembers had been convicted of various federal felonies. An election conducted less than two weeks before the convictions indicated the will of voting populace of the reservation and that will was apparently for a new government.

Answer Brief at 8.

As events here have shown, turmoil was not prevented by the issuance of the June 26 decision. The Board finds it hard to believe that anyone could have expected that decision to end the conflict among the Band's factions. The Board finds it much more likely that BIA acted with such dispatch because of concerns that Darrell Wadena, Rawley, and Clark might otherwise continue to have ready access to tribal funds. This surmise is based on the fact that the only reason given an the June 26 decision as to why immediate action was necessary was "to protect and secure tribal resources" (emphasis added). June 26 Decision at 1. The Area Director first refers to the government-to-government relationship at page 8 of his answer brief where he contends that "[r]ecognition of the interim tribal council, composed of two newly elected individuals and a previously elected district representative, allowed the

BIA to continue a government-to-governrrent relationship with individuals capable of handling tribal funds." Even here, the emphasis is still on tribal resources.

In recognizing an interim tribal council for the apparent purpose of protecting and securing tribal resources, BIA appears to have assumed that the Federal district court in which Darrell Wadena, Rawley, and Clark had just been convicted of crimes involving mishandling of tribal resources was not willing or able to protect those resources. Although most of the court's actions in this regard were taken after the June 26 decision, it is now clear that such an assumption was unwarranted. The court took great pains in limiting the right of these individuals to be released pending sentencing, including a ban on involvement with tribal finances. It also had no problem incarcerating Darrell Wadena when it determined that he had violated the term of his release relating to financial matters.

Assuming that tribal resources had to be protected by an entity outside the Band or Tribe, the district court, with its control over the convicted individuals, including the power of incarceration, was in at least as good a position to protect those resources as BIA, whose enforcement powers are actually quite limited. More importantly, however, the district court could protect tribal resources without violating the Band's sovereignty and right of self-governnent.

The Board concludes that the circumstances existing in regard to the Band's leadership on June 26, 1996, did not justify the recognition of an interim tribal council composed of McArthur, Buckanaga, and Tony Wadena.

Appellants also contend that the June 26 decision violated Article I, Section 1(f), of the Band's Ordinance No. 1-65, which provides that the Chairman of the Tribal Council "shall * * * [n]ot vote in meetings of the [Tribal Council] except in the case of a tie;" and violated Article II, Section 3, of that ordinance, which provides that "[t]hree (3) members of the [Tribal Council] shall constitute a quorum" (emphasis in original). The June 26 decision, "notwithstanding any established procedures to the contrary," reduced the quorum to two members and implicitly held that the Chairman could vote on any issue.

The Area Director's answer brief does not address these contentions.

The Board concludes that this portion of the June 26 decision cannot even be characterized as an interpretation of Ordinance No. 1-65. Instead, it either ignores or attempts to rewrite the Ordinance's provisions concerning quorums and when the Chairman can vote. The Board concludes that the Department of the Interior lacks authority to ignore or rewrite the Band's legislation.

Accordingly, the Board reverses the June 26 decision's recognition of an interim tribal council consisting of McArthur, Buckanaga, and Tony Wadena. It also reverses the statement in the June 26 decision that two

members of the interim tribal council constituted a quorum and its implicit statement that the Chairman of the interim tribal council could vote in cases other than when there was a tie vote between the other two members of the interim tribal council.

The Board is not here being naive or residing in "an ivory tower." It is well aware of concerns over the years by tribal members that Darrell Wadena and his supporters were attempting to maintain themselves in power through such tactics as physical intimidation, withholding of tribal employment opportunities and/or tribal services, and election fraud. It is also well aware that McArthur ran as a reform candidate and that some of the resolutions passed immediately upon his assumption of the Chairmanship appear intended to allow fuller participation in government by tribal members, and even to ensure that there would be no retaliation against tribal members who had supported Darrell Wadena. Furthermore, the Board knows that there were allegations that tribal funds continued to be diverted up to and during the district court criminal proceedings, and that some of McArthur's supporters and counselors may also have used less than honorable tactics after McArthur assumed power.

It is not the Board's role here, however, to pass upon the character of any of the individuals concerned. Rather, the Board's task is to determine whether the June 26 decision is legally supportable. The Board concludes that it is not. The Board also concludes that the decision embodies a "retreat into the old days of paternalism" 14/ that it cannot, and will not, condone on behalf of the Secretary of the Interior.

Questions remain, however, as to what happens now, and who is, or should be, on the Tribal Council. Numerous events have occurred since June 26, 1996. Novack and Day have issued conflicting decisions on the election protests, with each decision being supported by a different faction of the Band. Numerous resolutions have been passed by either or both the interim tribal council recognized by the June 26 decision or an interim tribal council including Vizenor and Auginaush-Hvezda. At a special election held by one faction, Doyle Turner received the most votes for the position of Chairman. On the basis of being the Band's Chairman, McArthur has been sworn in as a member of the Tribal Executive Committee. 15/ Elections have been scheduled for January and March 1997 by a resolution passed by McArthur's interim tribal council. The positions currently on the ballot for those elections may be for seats that are not vacant under the constitution. There is also some information before the Board indicating that there

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14/ Smoke v. Acting Eastern Area Director, 30 IBIA 90, 91 (1996).

15/ After the Board issued its Oct. 8, 1996, order, a BIA employee was quoted in the Oct. 11, 1996, edition of the Native American Press/Ojibwe News as stating that the Board had "no authority to overrule the [Tribal Executive Committee's] recognition of McArthur [through his swearing-in on Oct. 8, 1996]. By the time [the Board] rules, the new White Earth elections will have taken place and that should take care of any further decisions on the matter from our office."

may have been a take-over of the Band's offices on or about December 5, 1996.

These are intra-tribal matters which must be resolved by the Band and the Tribe. Unfortunately, the June 26 decision; the October 1, 1996, Field Solicitor's memorandum; and the apparent decision by BIA to ignore the Board's September 10, 1996, order, have made tribal resolution of the issues more difficult. However, the Band, as a sovereign nation, has not only the right, but also the responsibility, to resolve this dispute for itself, without further interference fran BIA. 16/ As long as the Band's final resolution does not conflict with its governing documents or the Indian Civil Rights Act, 25 U.S.C. § 1302, 17/ BIA must defer to the Band's resolution of this intra-tribal dispute.

16/ It appears that other parts of the Department have, in the past, agreed with this statement. In a Feb. 6, 1992, letter to Vizenor, who had written apparently concerning past election problems, the Deputy Commissioner of Indian Affairs stated:

"After further review of the documents, we have concluded that all of the issues involved are internal tribal matters and should primarily be resolved within the framework of the existing tribal governmental structure. It is the policy of the Department of the Interior (Department) and the BIA not to become involved in the internal affairs of tribal governments. In this regard neither the Department nor the BIA has any legal authority to involve itself in the dispute. In fact, the BIA is required to recognize a tribal governing body during an election dispute for purposes of carrying on its government-to-government relationship with a tribe. See Goodface v. Grassrope, 708 F.2d 335 (8th Cir. 1983). However, where a separate tribal forum exists for resolving the dispute, the BIA will not interfere in the final resolution of the dispute. Wheeler v. Depratment of the Interior, 811 F.2d 549 [10th Cir. (1987)].

"We are not suggesting that your complaints are without merit, only that existing tribal forums and processes should be utilized to the fullest extent."

Similarly, in a Mar. 26, 1992, letter to Lowell Bellanger, who had apparently sought BIA assistance in regard to his concerns over the Band's leadership, the Area Director stated:

"The issues which you raise and which continue to plague the White Earth Band are internal tribal matters which can be resolved only by the membership of the community. As long as the membership is willing to tolerate political factionalism resulting from the perpetuation of personal and political difference among its leadership, internal strife and conflict will prevail."

17/ See John, supra; Naylor v. Sacramento Area Director, 23 IBIA 76 (1992); Greendeer v. Minneapolis Area Director, 22 IBIA 91 (1992) (BIA has the authority and the responsibility to decline to recognize a tribal action where it finds that the action is tainted by a violation of the Indian Civil Rights Act).

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Minneapolis Area Director's June 26, 1996, decision is reversed.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge